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NO. 85-1989

In the Supreme Court of the United States

OCTOBER TERM, 1985

CROWN ZELLERBACH CORPORATION,
Petitioner

versus

INGRAM INDUSTRIES, INC., CHEROKEE INSURANCE CO., and the LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION OF THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED

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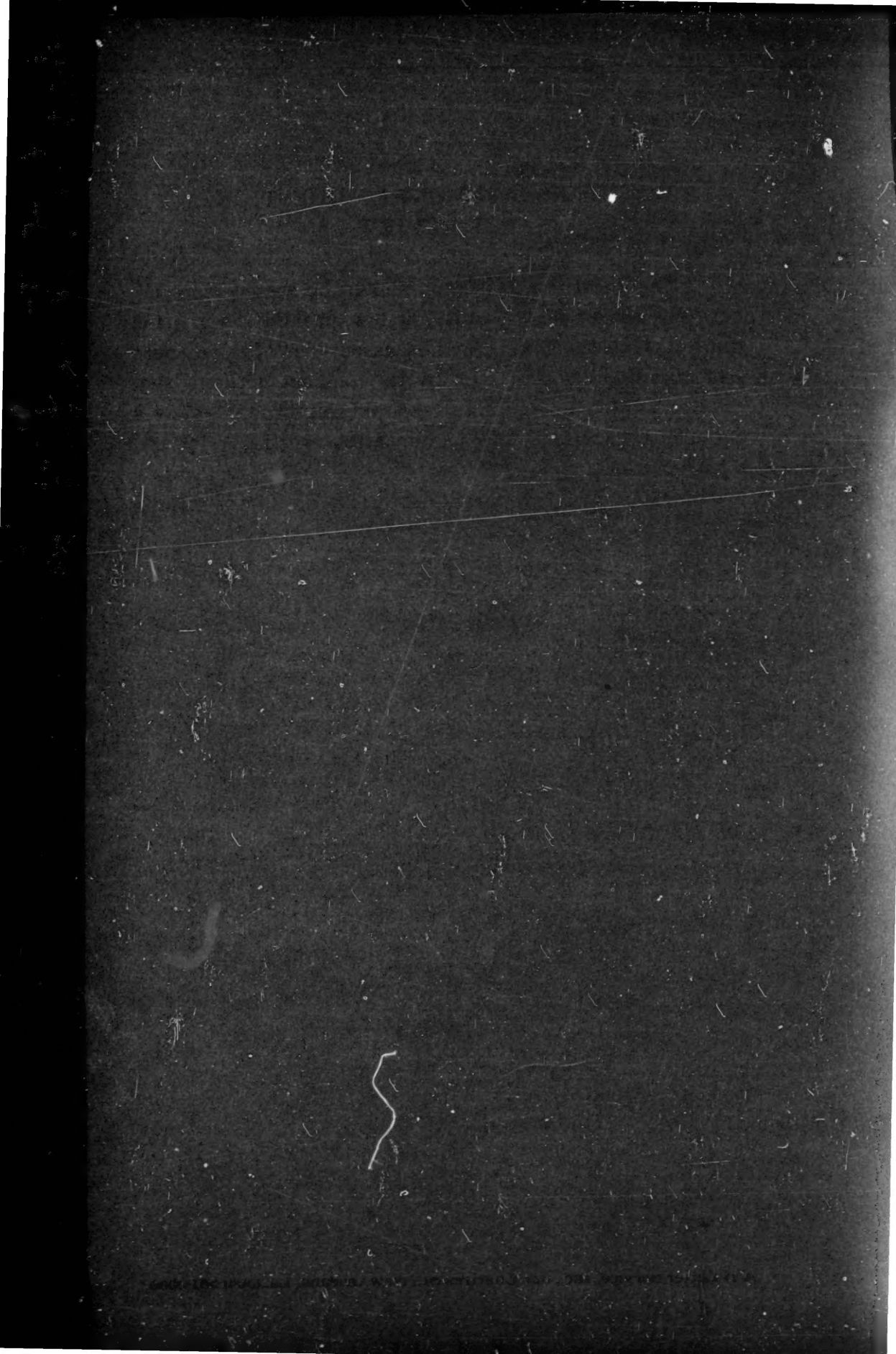

COUNTERSTATEMENT OF QUESTIONS FOR REVIEW

The questions presented should be stated more accurately as: whether Louisiana law prohibits a marine mutual protection and indemnity association of shipowners from limiting its coverage, by its contract with its own member, to the amount of the assured shipowner member's judicially declared federal limitation of liability; and whether the shipowner's federal limitation of liability is a "personal defense", to it as that term is used in Louisiana law.

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V

INGRAM INDUSTRIES, INC., CHEROKEE INSURANCE CO., AND THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED,

Respondents

OPPOSITION OF THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED TO THE PETITION OF CROWN ZELLERBACH CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

This case arises from a collision of an Ingram tug and tow with a Crown Zellerbach water intake structure in the Mississippi River above New Orleans in February, 1979.

Ingram was insured for protection and indemnity risks, which included the liability for this accident, by Cherokee Insurance Company, an American company, with a monetary limit of one million dollars. It was also entered with The London Steam-Ship Owners' Mutual Insurance Association, Limited, (hereinafter, the London Club) with a one million dollar deductible, and with this condition:

> When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, liability of this Class shall not exceed the amount of such limitation ...

Suit was commenced in admiralty, in the United States District Court for the Middle District of Louisiana, at Baton Rouge, and, under the Louisiana direct action statute,[1] against the London Club. Ingram, by answer, not by affirmative petition, pleaded its right, under the federal limitation of liability act, to limit its liability to the value of its interest in the vessel and its freight then pending.[2] The London Club, in no way attacking the direct action statute, pleaded the contractual limit of its coverage.

Before trial, Ingram, Cherokee, and the London Club stipulated liability for the accident, reserving only damages and Ingram's right to limit its liability.

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[1] La. R.S.22:655, see appendix A-1.

[2] 46 U.S.C. Sec. 183(a).

The trial court found Ingram entitled to limit its liability to $2,100,000 (round figures), and assessed Crown Zellerbach's damages at $3,950,000; gave judgment against Ingram and Cherokee for $1,000,000 (Cherokee's limit); against Ingram and the London CLub for the balance of Ingram's limited liability, $1,100,000; and, finally, against the London Club alone for the entire balance, $1,850,000, with interest and costs.[3] This last was directly in face of, and contrary to, the provision of the London Club's Rules or coverage.

Still not attacking the Louisiana direct action statute, Cherokee and the London Club promptly satisfied in full the principal of Ingram's liability under this judgment. The Club then appealed the assessment of the balance of the judgment directly against it, as a violation of its valid contract with its own member, Ingram.

A divided panel[4] affirmed on this point, under the asserted authority of the Fifth Circuit's own prior decision, *Olympic Towing Corporation v. Nebel Towing Company*, a decision which had rebuffed an attack on the Louisiana direct action statute in a limitation of liability situation on the untenable ground that the federal limitation of liability was a "personal defense" under Louisiana law.[5]

Nebel had been decided, in effect, on a 7 to 6 vote of the Fifth Circuit, in that it was a panel decision, with rehearing *en banc* denied by that vote.

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[3] See the district court's judgment, our appendix A-2, omitted from petitioner's appendix.

[4] 745 F.2d 995.

[5] 419 F.2d 230 (1969) *cert.den.* 397 U.S. 989.

In the present case, the Fifth Circuit, *en banc*, by a 12 to 5 division,[6] expressly overruled *Nebel*, as not representing Louisiana law, and at the same time held that the London Club's rule, by fixing its liability to its own member (and hence, to third parties), to the legally limited liability of the member, did not violate Louisiana law.

It is from this decision that petitioner seeks to obtain a writ.

SUMMARY OF ARGUMENT

Reasons Why the Case Should Not Be Reviewed by this Court

A

The decision below in no way conflicts with any prior decision of this Court, particularly, *Maryland Casualty Co. v. Cushing*.[7]

B

The decision below does not determine an issue of Louisiana law contrary to Louisiana jurisprudence, and the statement that it does is wholly erroneous.

C

The decision below does not create any conflict among federal courts; the statement that it does is baseless.

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[6] 783 F.2d 1296.

[7] 347 U.S. 409 (1954).

D

The decision below does not adversely affect any important state interest.

ARGUMENT

A

The Decision below is in Conflict with No Decision of this Court.

The petition opens with the statement that the decision here is in "conflict" with this Court's decision of *Maryland Casualty v. Cushing*.[8] This statement, which will not bear examination, has never once been asserted at any time in the long history of the present litigation.[9] Nothing in this case faintly approximates the situation in *Cushing* and to argue that it does is to ignore the true situation in both.

Cushing involved the sinking of a tug in Louisiana waters, with the loss of five seamen. The tug owner petitioned for limitation of liability in the United States District Court for the Eastern District of Louisiana, and the plaintiffs thereupon proceeded directly against the tug's P & I underwriters under the Louisiana statute. The district court dismissed their suits. The Fifth Circuit reversed, and the case came to this Court.

In that case, underwriters made a direct, frontal attack on the Louisiana statute, as violative of the uniformity of admiralty, and as contrary to the Limitation of Liability Act.

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[8] 347 U.S. 409 (1954).

[9] Except in the dissent *en banc* below.

This Court divided 4-1-4 on that issue. Justice Clark was the one, with Justice Frankfurter writing the opinion of the Court, concurring in Justice Clark's conclusion.

As Justice Frankfurther put it:[10]

> The only question presented in the petition for certiorari is whether the application of the Louisiana statute in this case would violate the Jones Act, the Limited Act, and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters.

He would have concluded that it did; but as Justice Clark, the "swing vote", stated it:[11]

> I see no necessity for invalidating Louisiana's law by dismissing these direct actions. In administering the Limited Liability Act the Court can easily avoid a clear conflict between it and the direct action statute.

Justice Clark concluded with what was the effective holding of the Court:[12]

> For these reasons I would direct the district court to first conclude the limitation proceeding, after which the liability, *if any,* of the petitioners on their policies in the direct action could be determined.
>
> (emphasis added)

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[10] 347 U.S. at 412.

[11] 347 U.S. at 423.

[12] 347 U.S. at 427.

The present case followed Justice Clark's direction. In this case, there was no petition by Ingram for limitation of liability; its right to limit was presented by answer. The London Club, as Co-defendant here, made no attack whatsoever on the Louisiana act and in no way contested its applicability. On the contrary, it immediately satisfied in full its portion of the principal of Ingram's liability as fixed by the district court.

Precisely what Justice Clark said should be done was done: the questions of Ingram's right to limit and the amount of its limited liability were first concluded, after which the liability, *if any,* of the underwriters under the "policy" in the direct action was determined.

The court below concluded that the provision of the Club's rules, its contract with its own member, measuring its liability to indemnify the member, and hence the plaintiff, by the actual, federally fixed legal liability of the member, is valid under Louisiana law.

This demonstrates the inaccuracy of petitioner's statement that the court below has "invalidated" the Louisiana statute, or that the result here is one that this Court refused to require in *Cushing.*

What has been done here is exactly what *Cushing* directed; and that it should be argued that the present case is in any sense whatever contrary to *Cushing* is without any basis.

B

The Decision Below is Not Contrary to Louisiana Jurisprudence

Petitioner's statement that the decision below

contravenes Louisiana law is erroneous and will not bear scrutiny.

In this case, the Fifth Circuit reexamined and overruled one of its own prior decisions involving Louisiana law,[13] but the argument that this "conflicts" with the "great weight" of Louisiana's state and federal jurisprudence and "directly conflicts" with a recent pronouncement of the Louisiana Supreme Court, is unsupportable.

The Louisiana direct action statute makes the insured and the insurer "jointly and in solido liable" to the third party, and the Louisiana Civil Code, article 1801 (formerly 2098), on "solidary obligors," provides that the obligor (here, the London Club), may raise against the obligee (here, the plaintiff), defenses personal to himself, but not such as are "personal" to another solidary obligor (here, the member).

That "defenses personal" to the insured may not be pleaded by the insurer in a direct action has long been settled in Louisiana law; but the application of that designation, "personal defense," to the shipowner's federally established and federally restricted right to seek limitation has come about by a patent misinterpretation of the Louisiana concept of "personal" defense.

It made its debut in a case in the Eastern District of Louisiana (Itco),[14] 11 years after *Cushing*, where, entirely

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[13] *Olympic Towing Corp. v. Nebel Towing Company*, 419 F.2d 230, 5th Cir. 1969), *cert.den.* 397 U.S. 989.

[14] *In the matter of Independent Towing Company*, 242 F.Supp. 950 (E.D.La. 1965).

unlike the situation here, the insurer was moving to stay the direct action against it, and, for the very first time anywhere, the district judge labeled the right of the shipowner to petition for limitation to be a "defense" "personal" to the shipowner under Louisiana law.

None of the authorities cited for that strange proposition was supportive of that proposition, but were supportive only of the well recognized principle that the Louisiana "personal defense", in the context of solidary obligations, referred only to absolute and complete immunities from any suit whatsoever: e.g., infancy, coverture, charitable immunity, governmental immunity, interdiction, lunacy, bankruptcy, and the like.

About a year later, in *Alcoa Steamship Company v. Charles Ferran & Co.*[15] a case which did *not* involve the shipowner's limitation of liability, the same district judge again listed the "personal defenses" under Louisiana law, those set out above, and then commented:

> In *Itco we merely added* to this list "vessel owners who asert their federally created right to limit liability".
>
> (emphasis added)

This deliberate, non-sequential injection of "vessel owners" into the list cannot be and is not supported by anything. It has no basis whatsoever in Louisiana state jurisprudence, before or since. The similarity between parents, spouses, bankrupts, lunatics, and vessel owners is, at the very least, obscure.

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[15] 251 F.Supp. 831 (E.D.La. 1966) states:

The personal defense attaches to the status. Hence, parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, *vessel owners, and the like* possess a defense denied their respective insurers. (emphasis supplied)

Before *Itco,* as embroidered by *Ferran,* both by the same district judge, there had never been a syllable or hint faintly suggesting that the shipwoner's right to seek limitation of liability could possibly be a "personal" defense under the Louisiana Civil Code. The whole notion was conceived by that district judge, without any support whatsoever in Louisiana jurisprudence.

The next development was the decision of the Fifth Circuit in *Nebel.*[16]

Again, entirely unlike the present case, *Nebel* involved a full scale, frontal attack on the direct action statute itself in the limitation of liability context, in effect, an effort to relitigate *Cushing.* Relying on *Ferran, supra,* which did not involve the federal limitation statute at all, *Nebel,* proceeded to hold that limitation was a "personal defense" under Louisiana law. It then quoted *Ferran's* list: parents, children, husbands, wives, governmental units, charitable units, "vessel owners and the like."

This obstrusive injection of "vessel owners", carried over from *Ferran,* is impossible to sustain, as the court below recognized. It completely disregards the fundamental and decisive fact that every single one of the "personal" defenses under Louisiana law is a complete, automatic, and absolute immunity from suit.

Shipowners' limitation of liability is in no sense whatsoever an immunity. It does not "adhere to the status." Shipowners may obtain it only under very

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16 *Olympic Towing Corp. v. Nebel Towing Co.,* 419 F.2d 230 (1969), *cert.den.* 397 U.S. 989.

restricted circumstances: their ability to prove that the accident occurred without the privity or knowledge of the owner; and even then, it is not an immunity but a limitation.

We shall not discuss the Louisiana cases on "personal defense" but shall list them in a footnote below should the Court desire to pursue them.[17] We limit ourselves here to the categorical, incontrovertible statement that the Louisiana "personal defense" is a total immunity from suit, in every instance and unvaryingly, and that it has never been applied to a situation such as ours.

That federal limitation of shipowner's liability is not an "immunity", and therefore not a "personal defense" in the Louisiana sense is perfectly plain, but is fortified by Justice Clark's comment in *Lake Tankers Corp. v. Henn:*[18]

> The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that

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[17] *Brooks v. Bass,* 184 So. 222 (La. App. 1938); *Rome v. London & Lancashire Indemnity Co.,* 169 So. 132 (La. App. 1936); *Harvey v. New Amsterdam Casualty,* 6 So.2d 774 (La. App. 1942), (cited in the petition, but not mentioning that it was a total immunity); *Smith v. Southern Farm Bureau Casualty Insurance Co.,* 164 So.2d 647 (La. App. 1964), where Judge Tate, who wrote the dissent in the present case, but was then on the state bench, referred throughout to the "interspousal immunity", the "statutory immunity", the "infra-familial immunity from suit", the parents' "immunity" from suit by the child; *Johnson v. Housing Authority of New Orleans,* 163 So.2d 569 (La. App. 1964); *Musmeci v. American Automobile insurance Co.,* 146 So.2d 496 (La. App. 1962) cert.den. 1963; *Edwards v. Royal Indemnity Co.,* 161 So.191 (Sup. Ct. La. 1935); *Rouley v. State Farm Mutual Sutomobile Insurance Co.,* 235 F.Supp. 786 (W.D.La. 1964); and most illuminating, *Ruiz v. Clancy,* 162 So. 734 (Sup.Ct.La.1935).

[18] 354 U.S. 147, at 152-153.

> granting him limited liability ... the Act, as we have said, was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight.

The statement of the petition (p. 13) that the Fifth Circuit here has failed to adhere to a "pronouncement" of the Louisiana Supreme Court, *Danzy v. United States Fidelity & Guaranty Co.*,[19] is incorrect. First, *Danzy* did not involve the Limitation Act but the immunity which the Federal Tort Claims Act gives to a federal employee from personal liability. The Louisiana Supreme Court, in an action directly against the employee's insurer, did not find it necessary to determine the effects of the "immunity" granted by the act's exclusivity provision. In a footnote, on page 1359, the court listed the forms of "immunity from suit" which constituted "personal defenses" and, having listed all the very same situations to which we have already referred, it added in passing, the "immunity" [sic] granted to shipowners, by limitation of liability, without analysis, and citing *Nebel*. This footnote has grown in the petition to a "citation with approval," a statement which has no justification. Instead, it shows the Louisiana Supreme Court's unconsidered listing of the federal limitation of liability as an "immunity", which, to constitute a "personal" defense under state law, it would have to be, but which, under federal law, it is not.

Lintz v. M/T APHRODITE B[20] needs no comment other than to point out that it is a decision of a district court, sitting in Louisiana, which, as it was then bound to do, merely followed *Nebel*.

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[19] 380 So.2d 1356 (1980).

[20] 561 F.Supp. 424 (E.D.La. 1983).

The reiterated statement in the petition that the decision below is contrary to state law is inaccurate and gains no stature by the reiteration. Further, the reiterated statement that the decision below allows the insurer to avail itself of the *shipowner's* right to limit is a misconception of respondent's position as to *Cushing*, as well as a misreading of the decision below. What was said by Justice Frankfurter in *Cushing*[21] is very pertinent here:

> Of course, liability underwriters are not entitled to "limitation of liability" as that phrase is used as a term of art in admiralty. To state the issue in these terms is to misconceive it.

The Fifth Circuit's reversal of its *Nebel* case was proper and it does not justify the issuance of a writ by this Court.

C

The Purported "Conflict Among Federal Courts" Does Not Exist

In asserting here that a "direct conflict" exists between *two* circuits on the question, the petition refers to a First Circuit case, *Ramos v. Continental Co.*,[22] citing a footnote, in that case, which petitioner sees as creating an alleged conflict on "personal defense", but in which the First Circuit itself expressly disavows passing on the point:

> As the issue is not before us, we do not now pass upon the merit of any such contention.

That is hardly a "conflict" of the circuits.

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[21] 347 U.S. at 42.

[22] 493 F.2d 329, at 333, note 4.

The district court opinion in Torres[23] is irrelevant here, since it relies on the Louisiana federal district court's opinions in *Itco* and *Ferran*, both of which antedated *Nebel* and were rendered obsolete by the overruling of *Nebel* in this case.

The "conflict" does not at all exist, and to pretend that it does is, at the very least, the legerdemain of a zealous advocate.

D

Alleged Adverse Effects on "Important" State Interests

The section of the petition devoted to the alleged "adverse" effects on state interests is, we suggest, totally unsupported. Nothing in the decision below affects the "traditional authority of states to provide tort remedies for their citizens"; nothing conflicts with Louisiana public policy; nothing turns "topsy turvy" the "public policy" favoring the injured party over the insurer. All of this, we most respectfully submit, is no more than rhetoric and is out of place here. So, too, is the extraneous injection of the *Silkwood* case, and the McCarran Act.

What this case really involves is the Fifth Circuit's proper correction of its own earlier erroneous confection of Louisiana law and nothing more.

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[23] *Torres v. Interstate Fire and Casualty Co.*, 275 F.Supp. 784 (D.P.R. 1967).

E

CONCLUSION

We submit that nothing in Louisiana law prohibits a marine mutual protection and indemnity association from limiting, by its contract with its own member (and hence third parties), the indemnity it affords its member, to the amount of the shipowner member's judicially declared federal limitation of liability; to the contrary, Louisiana law authorizes, recognizes, and enforces contractual limits; and we further submit that the shipowner's federal limitation of liability is not a "personal defense" as that term is used in the Louisiana law. In every single case the "personal defense" under Louisiana law is a total, complete immunity from suit, which is essentially no different from immunities in the common law states, an immunity which the federal limitation of shipowner's liability is not.

The decision of the Court of Appeals in this case is proper and there is no justification for the issuance of a writ.

Respectfully submitted,

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APPENDIX A

The Louisiana Direct Action Statute, La. R.S. 22:655 provides:

> No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.

Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.

APPENDIX B

CORRECTED JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Ingram Industries, Inc., limiting its liability in this case to the sum of $2,134,918.88.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of Crown Zellerbach Corporation in the total sum of $3,948,210.31, together with interest at the rate of 10.41% per annum from December 11, 1980, until paid on the total judgment and all costs of these proceedings. Of this sum, judgment in the amount of $1,025,000.00 be entered against Ingram Industries, Inc. and Cherokee Insurance Company for the maximum limits of the latter's policy of insurance covering the M/V F.R. BIGELOW. Above that, judgment in the amount of $1,109,918.88 be entered against Ingram Industries, Inc. and London Steam-Ship Owners' Mutual Insurance Association, Ltd. Thereafter, judgment be entered against London Steam-Ship Owners' Mutual Insurance Association, Ltd. for the balance of the judgment, with interest and costs as aforesaid.

BATON ROUGE, LOUISIANA, November 22, 1982.

FRANK J. POLOZOLA
U.S. DISTRICT JUDGE
MIDDLE DISTRICT